

# HOUSE BILL No. 1370

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## DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 4-2-7; IC 33-39-1-6.

**Synopsis:** Special prosecutors and inspector general. Permits the chief judge of the court of appeals to appoint a special prosecuting attorney to investigate or prosecute a matter within the competence of the inspector general if a conflict of interest, the appearance of impropriety, or the possible commission of a crime would disqualify the inspector general. Requires the special prosecuting attorney to be an elected prosecuting attorney or a chief deputy prosecuting attorney. Gives the special prosecuting attorney investigative and prosecutorial powers similar to those of the inspector general. Makes conforming amendments.

**Effective:** July 1, 2006.

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**Van Haaften**

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January 12, 2006, read first time and referred to Committee on Government and Regulatory Reform.

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Second Regular Session 114th General Assembly (2006)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2005 Regular Session of the General Assembly.

## HOUSE BILL No. 1370

A BILL FOR AN ACT to amend the Indiana Code concerning state offices and administration.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. IC 4-2-7-9 IS ADDED TO THE INDIANA CODE AS A **NEW** SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: **Sec. 9. (a) The chief judge of the court of appeals:**

**(1) shall appoint a special prosecuting attorney if:**

**(A) a person other than the inspector general files a verified petition requesting the appointment of a special prosecuting attorney to investigate or prosecute a matter described in section 3 of this chapter;**

**(B) the verified petition asserts that it is inappropriate for the inspector general to investigate or prosecute the matter due to:**

**(i) the appearance of impropriety; or**

**(ii) an actual conflict of interest; and**

**(C) the inspector general agrees that a special prosecuting attorney is needed;**

**(2) may appoint a special prosecuting attorney if:**

**(A) a person files a verified petition requesting the**

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1 appointment of a special prosecuting attorney to  
 2 investigate or prosecute a matter described in section 3 of  
 3 this chapter; and

4 (B) the chief judge, after:

5 (i) notice is given to the inspector general; and

6 (ii) an evidentiary hearing is conducted at which the  
 7 inspector general is given an opportunity to be heard;  
 8 finds by clear and convincing evidence that the  
 9 appointment is necessary to avoid the appearance of  
 10 impropriety or an actual conflict of interest, or there is  
 11 probable cause to believe that the inspector general has  
 12 committed a crime; and

13 (3) may appoint a special prosecuting attorney if:

14 (A) the inspector general files a petition requesting the  
 15 chief judge to appoint a special prosecuting attorney to  
 16 investigate or prosecute a matter described in section 3 of  
 17 this chapter;

18 (B) the petition asserts that it is inappropriate for the  
 19 inspector general to investigate or prosecute the matter  
 20 due to:

21 (i) the appearance of impropriety; or

22 (ii) an actual conflict of interest; and

23 (C) the chief judge finds that the appointment is necessary  
 24 to avoid the appearance of impropriety or an actual  
 25 conflict of interest.

26 (b) Each person appointed to serve as a special prosecuting  
 27 attorney under this section:

28 (1) must consent to the appointment; and

29 (2) must be the prosecuting attorney or chief deputy  
 30 prosecuting attorney in a county other than the county in  
 31 which the person is to serve as special prosecuting attorney.

32 (c) The chief judge shall establish the length of the special  
 33 prosecuting attorney's term. If the target of an investigation by the  
 34 special prosecuting attorney is a public servant (as defined in  
 35 IC 35-41-1-24), the court shall order the special prosecuting  
 36 attorney to file a report of the investigation with the court of  
 37 appeals at the conclusion of the investigation. The report is a public  
 38 record.

39 (d) If the special prosecuting attorney is not regularly employed  
 40 as a full-time prosecuting attorney or full-time chief deputy  
 41 prosecuting attorney, the compensation for the special prosecuting  
 42 attorney's services:

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(1) shall be paid to the special prosecuting attorney by the inspector general; and

(2) may not exceed:

(A) a per diem equal to the regular salary of the prosecuting attorney of Marion County; and

(B) travel expenses and reasonable accommodation expenses actually incurred.

(e) If the special prosecuting attorney is regularly employed as a full-time prosecuting attorney or chief deputy prosecuting attorney, the compensation for the special prosecuting attorney's services:

(1) shall be paid by the inspector general to the treasurer of the county in which the special prosecuting attorney regularly serves; and

(2) must include a per diem equal to the regular salary of the full-time prosecuting attorney of Marion County, travel expenses, and reasonable accommodation expenses actually incurred.

SECTION 2. IC 4-2-7-10 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: **Sec. 10. (a) This section applies to a special prosecuting attorney appointed under section 9 of this chapter. This section applies if the special prosecuting attorney appointed under section 9 of this chapter finds evidence of misfeasance, malfeasance, nonfeasance, misappropriation, fraud, or other misconduct that resulted in a financial loss to the state or in an unlawful benefit to an individual in the conduct of state business.**

**(b) If the special prosecuting attorney finds evidence described in subsection (a), the special prosecuting attorney shall certify a report of the matter to the attorney general and provide the attorney general with any relevant documents, transcripts, or written statements. Not later than one hundred eighty (180) days after receipt of the report from the special prosecuting attorney, the attorney general shall do one (1) of the following:**

**(1) File a civil action (including an action upon a state officer's official bond) to secure for the state the recovery of funds misappropriated, diverted, missing, or unlawfully gained. Upon request of the attorney general, the special prosecuting attorney shall assist the attorney general in the investigation, preparation, and prosecution of the civil action.**

**(2) Inform the special prosecuting attorney that the attorney general does not intend to file a civil action for the recovery of**

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funds misappropriated, diverted, missing, or unlawfully gained. If the attorney general elects not to file a civil action, the attorney general shall return to the special prosecuting attorney all documents and files initially provided by the special prosecuting attorney.

(3) Inform the special prosecuting attorney that the attorney general is diligently investigating the matter and after further investigation may file a civil action for the recovery of funds misappropriated, diverted, missing, or unlawfully gained. However, if more than three hundred sixty-five (365) days have passed since the special prosecuting attorney certified the report to the attorney general, the attorney general loses the authority to file a civil action for the recovery of funds misappropriated, diverted, missing, or unlawfully gained and shall return to the special prosecuting attorney all documents and files initially provided by the special prosecuting attorney.

(c) If the special prosecuting attorney has found evidence described in subsection (a) and reported to the attorney general under subsection (b) and:

- (1) the attorney general has elected under subsection (b)(2) not to file a civil action for the recovery of funds misappropriated, diverted, missing, or unlawfully gained; or
- (2) under subsection (b)(3) more than three hundred sixty-five (365) days have passed since the special prosecuting attorney certified the report to the attorney general under subsection (b) and the attorney general has not filed a civil action;

the special prosecuting attorney may file a civil action for the recovery of funds misappropriated, diverted, missing, or unlawfully gained.

(d) If the special prosecuting attorney has found evidence described in subsection (a), the special prosecuting attorney may institute forfeiture proceedings under IC 34-24-2 in a court having jurisdiction in a county where property derived from or realized through the misappropriation, diversion, disappearance, or unlawful gain of state funds may be located, unless a prosecuting attorney has already instituted forfeiture proceedings against that property.

SECTION 3. IC 4-2-7-11 IS ADDED TO THE INDIANA CODE AS A NEW SECTION TO READ AS FOLLOWS [EFFECTIVE JULY 1, 2006]: Sec. 11. (a) This section applies only to a special prosecuting attorney appointed under section 9 of this chapter.

(b) If the special prosecuting attorney discovers evidence of

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1 criminal activity, the special prosecuting attorney shall certify the  
2 following information to the appropriate prosecuting attorney:

3 (1) The identity of any person who may be involved in the  
4 criminal activity.

5 (2) The criminal statute that the special prosecuting attorney  
6 believes has been violated.

7 In addition, the special prosecuting attorney shall provide the  
8 prosecuting attorney with any relevant documents, transcripts, or  
9 written statements. If the prosecuting attorney decides to prosecute  
10 the crime described in the information certified to the prosecuting  
11 attorney, or any other related crimes, the special prosecuting  
12 attorney shall cooperate with the prosecuting attorney in the  
13 investigation and prosecution of the case. Upon request of the  
14 prosecuting attorney, the special prosecuting attorney may  
15 participate on behalf of the state in any resulting criminal trial.

16 (c) If:

17 (1) the prosecuting attorney to whom the special prosecuting  
18 attorney issues a certification under subsection (b):

19 (A) is disqualified from investigating or bringing a  
20 criminal prosecution in the matter addressed in the  
21 certification;

22 (B) does not file an information or seek an indictment not  
23 later than one hundred eighty (180) days after the date on  
24 which the special prosecuting attorney certified the  
25 information to the prosecuting attorney; or

26 (C) refers the case back to the special prosecuting  
27 attorney; and

28 (2) the special prosecuting attorney finds that there may be  
29 probable cause to believe that a person identified in a  
30 certification under subsection (b)(1) has violated a criminal  
31 statute identified in a certification under subsection (b)(2);  
32 the special prosecuting attorney may prosecute the matter  
33 addressed in the certification.

34 (d) Except as provided in subsection (f), a special prosecuting  
35 attorney appointed under section 9 of this chapter has the same  
36 powers as the prosecuting attorney of the county. However, the  
37 chief judge of the court of appeals shall:

38 (1) limit the scope of the special prosecuting attorney's duties  
39 as a special prosecuting attorney to include only the  
40 investigation or prosecution of a particular case or particular  
41 grand jury investigation, including any matter that  
42 reasonably results from the investigation, prosecution, or

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1 grand jury investigation; and

2 (2) establish for a time certain the length of the special  
3 prosecuting attorney's term.

4 If the special prosecuting attorney's investigation or prosecution  
5 acquires a broader scope or requires additional time to complete,  
6 the chief judge of the court of appeals may at any time increase the  
7 scope of the special prosecuting attorney's duties or establish a  
8 longer term for the special prosecuting attorney.

9 (e) A special prosecuting attorney may appoint one (1) or more  
10 deputies who are licensed to practice law in Indiana to serve as a  
11 special deputy prosecuting attorney. A special deputy prosecuting  
12 attorney is subject to the same statutory restrictions and other  
13 restrictions imposed on the special prosecuting attorney by the  
14 court of appeals, but otherwise has the same powers as a deputy  
15 prosecuting attorney.

16 (f) A special prosecuting attorney may bring a criminal charge  
17 only after obtaining an indictment from a grand jury. A special  
18 prosecuting attorney may not bring a criminal charge by filing a  
19 information.

20 SECTION 4. IC 33-39-1-6, AS AMENDED BY P.L.222-2005,  
21 SECTION 38, IS AMENDED TO READ AS FOLLOWS [EFFECTIVE  
22 JULY 1, 2006]: Sec. 6. (a) Special prosecutors may be appointed under  
23 this section or in accordance with ~~IC 4-2-7-7~~. **IC 4-2-7.**

24 (b) A circuit or superior court judge:

25 (1) shall appoint a special prosecutor if:

- 26 (A) any person other than the prosecuting attorney or the
- 27 prosecuting attorney's deputy files a verified petition
- 28 requesting the appointment of a special prosecutor; and
- 29 (B) the prosecuting attorney agrees that a special prosecutor is
- 30 needed;

31 (2) may appoint a special prosecutor if:

- 32 (A) a person files a verified petition requesting the
- 33 appointment of a special prosecutor; and
- 34 (B) the court, after:
  - 35 (i) notice is given to the prosecuting attorney; and
  - 36 (ii) an evidentiary hearing is conducted at which the
  - 37 prosecuting attorney is given an opportunity to be heard;
  - 38 finds by clear and convincing evidence that the appointment
  - 39 is necessary to avoid an actual conflict of interest or there is
  - 40 probable cause to believe that the prosecutor has committed a
  - 41 crime;

42 (3) may appoint a special prosecutor if:

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- 1 (A) the prosecuting attorney files a petition requesting the  
 2 court to appoint a special prosecutor; and  
 3 (B) the court finds that the appointment is necessary to avoid  
 4 the appearance of impropriety; and  
 5 (4) may appoint a special prosecutor if:  
 6 (A) an elected public official, who is a defendant in a criminal  
 7 proceeding, files a verified petition requesting a special  
 8 prosecutor within ten (10) days after the date of the initial  
 9 hearing; and  
 10 (B) the court finds that the appointment of a special prosecutor  
 11 is in the best interests of justice.  
 12 (c) Each person appointed to serve as a special prosecutor:  
 13 (1) must consent to the appointment; and  
 14 (2) must be:  
 15 (A) the prosecuting attorney or a deputy prosecuting attorney  
 16 in a county other than the county in which the person is to  
 17 serve as special prosecutor; or  
 18 (B) except as provided in subsection (d), a senior prosecuting  
 19 attorney.  
 20 (d) A senior prosecuting attorney may be appointed in the county in  
 21 which the senior prosecuting attorney previously served if the court  
 22 finds that an appointment under this subsection would not create the  
 23 appearance of impropriety.  
 24 (e) A person appointed to serve as a special prosecutor has the same  
 25 powers as the prosecuting attorney of the county. However, the  
 26 appointing judge shall limit scope of the special prosecutor's duties to  
 27 include only the investigation or prosecution of a particular case or  
 28 particular grand jury investigation.  
 29 (f) The court shall establish the length of the special prosecutor's  
 30 term. If the target of an investigation by the special prosecutor is a  
 31 public servant (as defined in IC 35-41-1-24), the court shall order the  
 32 special prosecutor to file a report of the investigation with the court at  
 33 the conclusion of the investigation. The report is a public record.  
 34 (g) If the special prosecutor is not regularly employed as a full-time  
 35 prosecuting attorney or full-time deputy prosecuting attorney, the  
 36 compensation for the special prosecutor's services:  
 37 (1) shall be paid to the special prosecutor from the unappropriated  
 38 funds of the appointing county; and  
 39 (2) may not exceed:  
 40 (A) a per diem equal to the regular salary of a full-time  
 41 prosecuting attorney of the appointing circuit; and  
 42 (B) travel expenses and reasonable accommodation expenses

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1 actually incurred.

2 (h) If the special prosecutor is regularly employed as a full-time  
3 prosecuting attorney or deputy prosecuting attorney, the compensation  
4 for the special prosecutor's services:

5 (1) shall be paid out of the appointing county's unappropriated  
6 funds to the treasurer of the county in which the special  
7 prosecutor regularly serves; and

8 (2) must include a per diem equal to the regular salary of a  
9 full-time prosecuting attorney of the appointing circuit, travel  
10 expenses, and reasonable accommodation expenses actually  
11 incurred.

12 (i) The combination of:

13 (1) the compensation paid to a senior prosecuting attorney under  
14 this chapter; and

15 (2) retirement benefits that the person appointed as a senior  
16 prosecuting attorney is receiving or entitled to receive;  
17 may not exceed the minimum compensation to which a full-time  
18 prosecuting attorney is entitled under IC 33-39-6-5.

19 (j) A senior prosecuting attorney appointed under this chapter may  
20 not be compensated as senior prosecuting attorney for more than one  
21 hundred (100) calendar days in total during a calendar year.

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